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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

AMERICAN STEAMSHIP COMPANY, as owner of the Str. JOHN J. BOLAND,

Petitioner,

VS.

THE INTERLAKE STEAMSHIP COMPANY, as owner of the Str. FRANK ARMSTRONG,

Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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THE INTERLAKE STEAMSHIP COMPANY, as owner of the Str. FRANK ARMSTRONG,

Respondent.

PETITION

Your petitioner, American Steamship Company prays for a Writ of Certiorari to the Court of Appeals for the Sixth Circuit to review its judgment filed February 6, 1952 affirming the decree of the United States District Court for the Northern District of Ohio filed July 11, 1950 and to review the order of the Court of Appeals for the Sixth Circuit filed March 14, 1952 denying your petitioner's petition for a re-hearing. The opinion of the Court of Appeals is reported at 194 F. 2d Page 25. The Court of Appeals rendered no opinion in denying petition for re-hearing. The opinion of the United States District Court is not officially reported, but it is reported at 1950 A. M. C. 1678.

Nature of the Case

The case arises out of an extremely serious collision in fog so dense that visibility was but about 200 feet (R. 99)

in the waters of Lake Erie on November 2, 1948 between the Str. FRANK ARMSTRONG, owned by The Interlake Steamship Company and the Str. JOHN J. BOLAND, owned by your petitioner.

The collision occurred in a stretch of water on the Canadian side of the international boundary in the western end of Lake Erie used by all vessels going to and from the Detroit River when bound to or from points ~~west~~ east of Toledo and also by vessels going to or from Toledo when bound to or from points ~~west~~ east of Toledo.

The District Court found that the collision was the result of the faults of both vessels and that they were equally at fault and should equally share the damage.

Petitioner contends that if the Str. JOHN J. BOLAND was at fault the faults of the Str. FRANK ARMSTRONG were so glaring, gross and flagrant that her faults contributed in greater degree to the collision than did any faults of the Str. JOHN J. BOLAND and that since the collision was in Canadian waters the comparative or "degree of fault" rule of the Canada Shipping Act has application (R. 549).

Notwithstanding a statement in the opinion of the Court of Appeals that their examination of the record left them in a fog nearly as thick as that on the lake on the night of the collision, there are certain circumstances in connection with the collision which make an analysis of the facts extremely simple.

Nevertheless it is felt in behalf of the petitioner, that it would be presumptuous to even ask the Supreme Court to review the facts of this case.

Therefore, the basis on which petitioner requests a review of the judgment of the Court of Appeals is that on the

evidence for the Str. FRANK ARMSTRONG alone without resort to any other evidence in the case she was guilty of glaring, gross and flagrant violation of the rules of navigation and of glaring and gross negligence.

A mere recital of the disclosures of the evidence from the ARMSTRONG alone as to her navigation and conduct preceding the collision will show how flagrant were her faults.

On the other hand, the impression given by the opinion of the Court of Appeals is that the navigation of the Str. FRANK ARMSTRONG was almost innocuous and the judgment of that Court even condones an alteration in course of the steamer while going at full speed against the most authoritative pronouncements and even against a decision of the Court itself in which the opinion was written by Judge Taft, later Chief Justice Taft, holding such an alteration in course a most grievous fault.

It is suggested that if the Court finds your petitioner's views are well founded and the judgment of the Court of Appeals should be reversed in respect of the basis on which this petition is made that the case may be remanded to the Court of Appeals for further consideration in the light of the judgment of this Court.

Jurisdiction

Jurisdiction to review the judgment is under Section 1254 (1) of the Judicial Code.

Southern Pacific Co. v. Hagland Admrx., 277 U. S. 304, 72 L. Ed. 892, 48 Sup. Ct. Rep. 510.

The Facts

At the time of the collision the ARMSTRONG was one of the most modern ships on the Great Lakes having been

built in 1943. She was 623 feet in length overall, had a beam of 60 feet and a depth of 30 feet (R. 83). She was equipped with a "Sperry Radar" (R. 84) and was also equipped with a compass course recorder (R. 64). She was of the conventional type of bulk lake freighter with engines aft and the pilot house forward.

The BOLAND was also of the conventional type of lake bulk freighter. She was about 500 feet in length overall with a beam of 52 feet and a depth of about 31 feet. She had no radar but had a gyro compass besides her magnetic compass (R. 329).

The collision occurred in a stretch of water about 17 miles long between Pelee Passage Light commonly called the Middle Ground (Libellant's Ex. 3-6, Respondent's Ex. Q W) at the eastern end of the stretch and Colchester Reef Light at the western end of the stretch. The Lake Survey Charts in evidence show a true course of 283° from Pelee Passage Light to Colchester Reef Light for a west bound vessel. The reverse of that course for an east bound vessel is 103°. The chart also shows the west bound course for vessels passing Pelee Passage Light to go to Toledo is 278°.

There is nothing compulsory about the indicated courses shown on the chart. To some extent the steering of one of such courses by a vessel is dependent upon her distance off one of the lights when passing it.

The ARMSTRONG was on a voyage from Superior, Wisconsin to Erie, Pennsylvania with a cargo of about 13,436 tons of iron ore (R. 83).

The BOLAND had left Lorain, Ohio about 8:20 P. M. in the evening of the collision for Toledo and had no cargo (R. 330). The collision occurred shortly after midnight.

Evidence From the ARMSTRONG

The collision was at 12:02 A. M., November 2, 1948 (R. 70).

The ARMSTRONG passed the East Channel Gas Buoys which are a short distance below the mouth of the Detroit River and which are 12 miles west of Colchester Reef at 10:12 P. M., November 1st, at full speed (R. 86). About 5 minutes after passing the East Channel Gas Buoys the Master of the ARMSTRONG was called to the pilot house because of fog and at that time she was on a course of 101° (R. 87).

On passing Colchester Reef a bearing by radar with the use of the variable marker and cursor line was taken showing the ARMSTRONG was 1.3 miles off the reef (R. 89).

The charted course of 283° (reverse 103°) from Colchester Reef to Pelee Passage is from a point three-quarters of a mile off Colchester Reef.

Shortly after passing Colchester Reef the ARMSTRONG was informed by radio-telephone from the Str. ELLWOOD down near the Middle Ground or Pelee Passage that the ELLWOOD had just met four west bound vessels and that the ARMSTRONG would be meeting them shortly (R. 91).

The four vessels were seen in the scope of the ARMSTRONG's radar and appeared to be one right after the other in a line running parallel to the course the ARMSTRONG was steering in the opposite direction (R. 94) and on the port bow of the ARMSTRONG (R. 117).

The first of the vessels proved to be the Str. COLONEL J. M. SCHOONMAKER. To pass the SCHOONMAKER the ARMSTRONG altered her course by 5° according to her Master

(R. 95) and by her compass course recorder the alteration was at 11:45½ P. M. and was from 100½° to 104½° (R. 67).

When abreast, the SCHOONMAKER was about one-half mile off the ARMSTRONG to the north by radar (R. 95, 118). On passing the ARMSTRONG the Master of the ARMSTRONG just listened to whistles in the pilot house window and did not thereafter look in the scope of the radar (R. 95, 130).

The three blast fog signals of the next vessel which proved to be the BOLAND were heard and the ARMSTRONG began blowing one blast passing signals (R. 96) and continued the blowing of three blast fog signals (R. 96).

The ARMSTRONG blew 4 or 5 one blast passing signals before it was claimed she checked at 11:55 P. M. (R. 96) and then continued blowing one blast passing signals without getting any reply excepting the three blast fog signals (R. 97) and altogether blew from 8 to 10 one blast passing signals without getting any answer (R. 119).

At 11:55 P. M. by her compass course recorder the ARMSTRONG altered her course by 10° from 104½° to 114½° and at 12:00½ A. M. altered about another 10° to the right and from 114½° to about 125° (R. 67).

By the ARMSTRONG'S compass course recorder the collision occurred at 12:02 A. M. ARMSTRONG'S time (R. 70).

The ARMSTRONG was at full speed until about the moment of collision.

The Master and Mate of the ARMSTRONG testified that the ARMSTRONG'S speed was checked from full speed ahead to half speed at 11:55 P. M. (R. 109, 236).

The log book of the ARMSTRONG with respect to the time she passed Colchester Reef and as to the time of the check

at 11:55 P. M. was not written up until about an hour after the collision. The original entries at the time of passing Colchester Reef and the check at 11:55 P. M. were made on a scratch pad and the slips on which they were made were not preserved (R. 108). The entry in the engine room log book is on one line:

"Check half ahead then full astern then stop."

And on the next line:

"Collision stop 12:03 A" (Libellant's Ex. 18, R. 301, 302).

The engineer at the throttle testified that it was not over a minute and a half or 2 minutes from the time of the half ahead until the collision (R. 307) and at the Coast Guard Hearing 2 days after the collision he testified that the half speed signal and the astern signal came within 30 seconds of each other and that the collision occurred half a minute after the full astern (R. 309, 310).

The Chief Engineer testified that it was about 2 minutes from the check to the collision (R. 324) and the Oiler likewise so testified (R. 315). At the Coast Guard Investigation the Master of the ARMSTRONG testified that the *second alteration* in course of 10° came *right after* the check (R. 125, 126).

The second alteration to the right of 10° was at 12:00½ A. M. (R. 67) or 1½ minutes before the collision.

Up to the time of the half speed order by the Engineer at the throttle, the ARMSTRONG's engine

"Was in the full speed ahead position and the engine was going full speed." (R. 300).

When the lights of the BOLAND were first seen she was a couple of hundred feet away on an angle of about 45° (R.

99) and it was claimed the stem of the BOLAND struck the port bow of the ARMSTRONG about 15 feet from the latter's stem (R. 99).

Following the collision the Second Mate of the ARMSTRONG went down below and came back and reported that the collision bulkhead was leaking a "little bit but nothing serious" (R. 135). Distress signals were heard from the BOLAND (R. 135). The ARMSTRONG continued swinging around to the right (R. 135) and by 12:12 A. M. 10 minutes after the collision she had come around almost 180° to 283½° (R. 70) and by the record in her engine room at 12:08 A. M. and 5 minutes after the time of collision as recorded in the engine room her engines were at full speed ahead (R. 302, 305) and the ARMSTRONG was on her way back to Bar Point (R. 135) (Near the mouth of the Detroit River).

I

Navigation of the ARMSTRONG was in flagrant disregard of the law with respect to speed in fog.

Canadian rules for navigation of the Great Lakes are substantially the same as the rules of the White Law which is the Act of Congress containing the rules of navigation for the Great Lakes. Title 33 U. S. Code (Sections 241-294). For convenience we will quote the American instead of the Canadian rules.

Rule 15, Section 272 of Title 33 U. S. Code is as follows:

> "Every vessel shall, in thick weather, by reason of fog, mist, falling snow, heavy rain storms, or other causes, go at moderate speed. A steam vessel hearing, apparently not more than four points from right ahead,

> the fog signal of another vessel shall at once reduce her speed to bare steerageway, and navigate with caution until the vessels shall have passed each other."

The ARMSTRONG failed to moderate her speed at all upon encountering fog and flagrantly violated the rules from the time she began to hear the fog signal of the Str. BOLAND continuing as she did at full speed until about the moment of collision.

This Court has expressed its views of such navigation in an opinion by Mr. Justice Henry Billings Brown in the UMBRIA, 166 U. S., 404, 407.

In that case the UMBRIA did reduce her speed upon first hearing the whistle of the IBERIA and continued under reduced speed until a second and perhaps a third whistle were heard. The Master of the UMBRIA thereupon determined that the approaching steamer was on a parallel course, that the UMBRIA was well clear of her and ordered engines full speed ahead again 4 minutes before the collision (P. 406).

The ARMSTRONG altered her course to the right to pass the SCHOONMAKER at 11:45½ P. M. (R. 117, 67). The Master of the ARMSTRONG estimated that the ARMSTRONG was abreast the SCHOONMAKER within 2 or 3 minutes after that alteration (R. 117).

The whistles of the BOLAND were heard right after the ARMSTRONG passed the SCHOONMAKER and first sounded about half a point on the ARMSTRONG's port bow (R. 283, 284).

The ARMSTRONG had not made any reduction in speed for meeting the SCHOONMAKER and then with the BOLAND approaching almost dead ahead on the estimated basis and

after first hearing fog whistles of the BOLAND at about 11:48 she continued at full speed until about the moment of collision.

We quote from the opinion in the UMBRIA:

"That the UMBRIA was *gravely in fault* in the matter of speed is too clear for serious argument. She was within 12 miles of one of the most frequented harbors in the world, in the track of vessels bound into and out of this harbor, and was running at a speed of from 16 to 19 knots an hour through an intermittent or variable fog, which was sometimes so dense that vessels could not see each other more than 1 or 2 lengths off. She had heard at least two whistles from the IBERIA, and without waiting definitely to locate her, had ordered her engines full speed ahead within a minute from the time she hove in sight. Her excuse is that the first whistle of the IBERIA, which does not seem to have been heard by the master, but was heard by some of the other officers, appeared to be upon the starboard bow, apparently a long distance off; that the second whistle also seemed a long distance off and well to the southward; and the master, supposing that they were from a steamer approaching upon a course parallel to his own, concluded that he was clear of her or had shaken her off; that the approaching steamer would probably port her helm to avoid the NORMANDIE, which was coming up on the UMBRIA'S starboard quarter, and therefore ordered his engines full speed ahead to avoid the danger consequent upon such a movement on the part of the IBERIA. This assumption was clearly an insufficient excuse for the order. It is difficult to locate the exact position of a vessel in a fog, and still more difficult to determine her course and distance; and while a whistle continues to be heard so nearly ahead, it is manifestly unsafe to assume that she is upon a course that will take her clear. The assumption might be justified if the signals were often repeated and kept constantly growing fainter or broader off the bow; but in this case the UMBRIA heard but two, or possibly three, whistles from the IBERIA, the last one of which must have seemed

nearer than the first, since the steamers were rapidly approaching each other. The IBERIA could not have appeared to be further to southward than when her first signal was blown, since she had then ported two points, and was really further to the northward. In resuming his speed under such circumstances, the master acts at his peril. As was said by Sir Robert Phillimore, in the case of THE KIRBY HALL, L. R. 8 Prob. Div. 71: 'We wish to state with as much emphasis as possible, that those in charge of a ship in such a dense fog as was described in this case should never conjecture anything when they hear a whistle in such close proximity, as was the case here, whether the sound appears to them to come from a vessel approaching them or not.' Of course there is a point depending upon the number, distinctness, and apparent position of the approaching signals, beyond which precautions are unnecessary and the master has the right to assume that he has shaken off the other vessel, but it is entirely clear that that point had not been reached in this case, and that the immediate cause of the collision was the order to go ahead at full speed before the course and position of the IBERIA had been definitely ascertained. Indeed, so gross was the fault of the UMBRIA in this connection, that we should unhesitatingly apply the rule laid down in ALEXANDRE *v.* MICHAN ("THE CITY OF NEW YORK", 147 U. S. 72, 85 (37:84, 90), and, THE LUDVIG HOLBERG, 157 U. S. 60, 71 (39: 620, 624), that any doubts regarding the management of the other vessel, or the contribution of her faults, if any, to the collision, should be resolved in her favor. It was suggested upon the argument that it was customary for large passenger steamers carrying the mails to run at full speed in a fog, and that this was really the safer course for them, as the greater the speed the sooner they pass the foggy belt. However this may be, the custom is not one to which the courts can lend their sanction as it implies a *flagrant disregard* of the safety of other vessels." (Emphasis ours) (P. 407).

II

The ARMSTRONG'S navigation was in flagrant disregard of Rule 26 of the White Law.

Rule 26 (Section 291 Title 33 U. S. Code) is as follows:

> "Rule 26. If the pilot of a steam vessel to which a passing signal is sounded deems it unsafe to accept and assent to said signal, he shall not sound a cross signal; but in that case, and in every case where the pilot of one steamer fails to understand the course or intention of an approaching steamer, whether from signals being given or answered erroneously, or from other causes, the pilot of such steamer so receiving the first passing signal, or the pilot so in doubt, shall sound several short and rapid blasts of the whistle; and if the vessels shall have approached within half a mile of each other both shall reduce their speed to bare steerageway, and, if necessary, stop and reverse."

The ARMSTRONG never slowed to bare steerageway and did not reverse engines until about 30 seconds before the collision according to the testimony of the engineer at the throttle at the Coast Guard Hearing held two days after the collision and not more than about 1 minute before the collision according to testimony at the trial, and never blew a danger signal until just before the collision and just before the engines were put full speed astern and when the BOLAND was only a couple of hundred feet away (R. 98, 99).

The rule itself clearly specifies the duty of a vessel under such circumstances and a mere recital of the testimony from the ARMSTRONG as to her own navigation convicts her of the most flagrant violation of the rule.

In the case of the SONOMA–EMPIRE CITY (Pittsburgh S. S. Co. v. Duluth S. S. Co.) C.C.A. 6, 222 F. 834, 835) the Court of Appeals for the Sixth Circuit itself found the SONOMA

at fault for failure to slow to a stand still and blow an alarm when she blew but *one* unanswered one blast passing signal.

Here the ARMSTRONG claims to have blown 8 to 10 one blast passing signals without getting an answering passing signal.

Besides the case of the SONOMA–EMPIRE CITY, flagrancy of the violation is established in such cases as:

The NEW YORK, 175 U. S. 187, 201.
The NORTH STAR, 62 F. 71 (C.C.A. 6).
GEORGE W. ROBY, 111 F. 601, (C.C.A. 6).
Hawgood Transit Co. v. Mesaba Transit Co., 166 F. 697, 701 (C.C.A. 6).

III

There was gross negligence of the ARMSTRONG in blindly, while at full speed, altering her course to the right.

The ARMSTRONG made an alteration in course to the right on the assumption that the BOLAND was on her port bow. Nothing could be more plain that her assumption was wrong because she had to make an alteration to the right of 20° after passing the SCHOONMAKER to reach and get into collision with the BOLAND.

Generally, an alteration of course in a fog is regarded as a grievous fault.

The most lenient view taken of such an alteration is that in the UMBRIA, 166 U. S. 404. In that case, the IBERIA was running with her engines "easy", the lowest order short of stopping, and a change in course on the part of the IBERIA was excused with Mr. Justice Brown writing:

"Under such circumstances, and in view of the fact that the exact position and course of the UMBRIA could not be determined, we think it would have been more prudent on the part of the IBERIA not to have changed her course until the position and course of the approaching steamer had been definitely ascertained, although we should be reluctant to hold that such change of course was a fault on her part, which should condemn her in a moiety of the damages. There are undoubtedly authorities and some expressions of this court to the effect that a change of the helm, in ignorance of the exact position and course of an approaching vessel, is a fault, although we have never held that it would be a fault in every case presenting these conditions. THE SARAH WATSON v. THE SEA GULL, 90 U. S. 23 Wall. 165, 175, 177 (23: 90, 93); *ALEXANDRE v. MACHAN, (THE CITY OF NEW YORK") 147 U. S. 72, 85 (37: 84, 90); THE JAMES WATT, 2 W. Rob. Adm. 271; THE ALBERTA, 23 Fed. Rep. 807, 811; THE BOUGAINVILLE, L. R. 5 P. C. 316; THE FRANCONIA, 4 Ben. 181, 185; THE SHAKSPEARE, 4 Be. 128; THE LORNE, 2 Stu. Adm. 177; THE WESTERN METROPOLIS, 2 Ben. 399, 402; THE HAMMONIA, 4 Ben. 518, 522; THE NORTHERN INDIANA, 3 Blatchf, 92, 110; THE NORTH STAR, 43 Fed. Rep. 807, 22 U. S. App. 242, 252; THE FOUNTAIN CITY, 22 U. S. App. 301; THE ARTHUR ORR, 69 Fed. Rep. 350; THE RESOLUTION, 6 Asp. Mar. L. Cas. 363."

In a case in the Sixth Circuit in which the opinion was written by Judge Taft, later Chief Judge Taft, and in which the change of course was somewhat comparable with that of the ARMSTRONG,

The NORTH STAR, 62 F. 71 (C.C.A. 6 1894) it was held:

"The recklessness of the SHEFFIELD in porting, instead of stopping and reversing, to ascertain with certainty the position and course of the NORTH STAR, *appears greater as the time and place of the porting is found to be nearer to the collision.* There was an obvious motive on the part of the SHEFFIELD's witnesses, therefore, to make the time between their porting and the collision as great as possible. This is the explana-

tion of the exchange of 7 single blasts a minute apart just preceding the collision, made so prominent a part of the SHEFFIELD's story. * * * The only reasonable explanation is that suggested by the District Judge.—a confusion of signals. The SHEFFIELD mistook a double blast from the STAR for a single blast, or perhaps two of them, and, without stopping to ascertain the STAR's exact position and course, recklessly took it for granted that she was going to port and herself ported and thus ran across the bows of the STAR. Of course, this was *reckless navigation and gross negligence* for which she must be condemned * * *" (PP. 80-81). (Emphasis ours.)

The court considered in that case that it had discretion with respect to the allowance of interest which was substantial because it was on the value of the SHEFFIELD which had been fixed at $177,214 and in the exercise of discretion with respect to such allowance it was held:

"It seems to us that the fault of the SHEFFIELD in porting so near the point of meeting, and crossing the bows of the NORTH STAR, involved gross recklessness, while the faults of the NORTH STAR were more excusable." (P. 86).

In the ALBERTA, 23 F. 807 (ED Mich. 1885) Judge Brown, later Mr. Justice Brown wrote:

"If the ALBERTA did port in ignorance of the actual position and course of the OSBORN, it was a fault for which she ought to be condemned. It is one of the elementary rules of navigation that a vessel ought never to alter her helm in ignorance of the position and course of an approaching vessel. It is true that by such change she may escape a collision, but the chances are equal that she will bring it about. Instead of experimenting, it is her duty to stop, and sometimes to reverse. THE JAMES WATT, 2 W. Rob. 270, 277; THE BOUGAINVILLE, L. R. 2 P. C. 316; THE FRANCONIA, 4 Ben. 181, 185; THE SHAKESPEARE, 4 Ben. 128; THE LORNE, 2 Staurt, Vice Adm. 177; THE SCOTIA, 5 Blatchf. 277" (P. 811).

In the GEORGE W. ROBY, 111 F. 601 (C. C. A. *6* 1901) notwithstanding a passing agreement by exchange of signals, it was held with Judge Lurton, later Mr. Justice Lurton writing:

> "To go ahead on the chance of safety from the change of course authorized by the passing agreement was to take a risk not justified by sound principles of navigation nor authorized by the positive rules of congressional legislation" (P. 610).

In addition to the above two cases and cases cited in the opinion of Mr. Justice Brown in the UMBRIA cases to the same effect are:

The DELAWARE, 213 F. 214, 215 (C. C. A. 2 1914);

Dollar S. S. Line v. Matson Nav. Co., 23 F. (2) 554, (C. C. A. 9 1928);

The WEAR, 23 Lloyd List Law Reports Page 59 ADM DIV. Oct. 29, 1925.

IV.

There was gross negligence in the navigation of the ARMSTRONG in her failure to use her radar as she approached the BOLAND and after passing the SCHOONMAKER.

An attempt was made to excuse the failure to use radar on the ground that some difficulty had been experienced with it.

The ARMSTRONG's radar could be used for 5 ranges between 1 mile and 30 miles (R. 84). It required but the turning of a knob to shift from one range to another (R. 76).

It was good enough to take a bearing at Colchester Reef from 1.3 miles off (R. 89).

The Master of the ARMSTRONG was able to determine with radar that the SCHOONMAKER passed the ARMSTRONG ½ mile to the north.

For a period of upwards of 13½ minutes before the collision after passing the SCHOONMAKER and in which the Master of the ARMSTRONG had her radar available there was no use of it at all.

In the AUSTRALIA STAR, 74 F. Supp. 145 (D. C. S. D. N. Y. 1947) where after the Master of the steamer had a radar report at 9:20 and failed to get another report four minutes later the Court held:

> "It has been suggested that to hold the AUSTRALIA STAR at fault is to penalize her because of her equipment with radar. That is a misconception. The conduct which is regarded as negligent on the part of a person of sound vision is not the same as that which is condemned when practiced by the blind. *The fault of the* AUSTRALIA STAR *is that she chose to remain blind when she had the means to see.*
>
> Prudent navigation involves taking advantage of all the safety devices at hand. Insofar as it is the judicial function to fit scientific discoveries into the framework of laws not tailored to their measure, the function should be carried out with an eye to the general purposes of the law, and to desirable social ends." (Emphasis ours.) (PP. 147, 148, 149).

In the MEDFORD, 65 F. Supp. 622 (D. C. E. D. N. Y. 1946) it was held:

> "The failure of the BARRY to use her radar is the most serious and sinister aspect of these causes. The perfection of that device is thought to have invoked a new concept of the responsibilities attaching to vessels so equipped, touching their handling and operation in or near a fog-bound area."

V.

In failing to "Stand-By" and in running away the ARMSTRONG violated a fundamental rule of common decency as expressed in the "Stand-By" Act enacted by Congress.

That statute is as follows:

"STAND-BY ACT. (Sept. 4, 1890); (27 Stat. L. 425). That in every case of collision between two vessels it shall be the duty of the master or person in charge of each vessel, if and so far as he can do so without serious danger to his own vessel, crew, and passengers, (if any) to stay by the other vessel until he has ascertained that she has no need of further assistance, and to render to the other vessel, her master, crew, and passengers (if any) such assistance as may be practicable, and as may be necessary in order to save them from any danger caused by the collision, and also to give to the master or person in charge of the other vessel the name of his own vessel and her port of registry, or the port or place to which she belongs, and also the name of the ports and places from which and to which she is bound. If he fails so to do, and no reasonable cause for such failure is shown, the collision shall, in the absence of proof to the contrary, be deemed to have been caused by his wrongful act, neglect, or default.

Sec. 2. That every master or person in charge of a United States vessel who fails, without reasonable cause to render such assistance or give such information as aforesaid shall be deemed guilty of a misdemeanor, and shall be liable to a penalty of one thousand dollars or imprisonment for a term not exceeding two years; and for the above sum the vessel shall be liable and may be seized and proceeded against by process in any district court of the United States by any person; one-half such sum to be payable to the informer and the other half to the United States.

Sec. 3. That this act shall take effect at a time to be fixed by the President by Proclamation is sued for that purpose." (33 U. S. Code 367).

The conduct of the ARMSTRONG in running away was the climax of her reckless navigation.

Reasons for Granting the Writ

I

The judgment of the Court of Appeals in this case in its failure to find the Str. FRANK ARMSTRONG was guilty of flagrant violation of the rules of navigation and gross negligence is contrary to authoritative decisions of this Court and of the Court of Appeals itself.

II

The judgment in the case is so superficial that it falls far short of fulfilling the obligation of a high court in Admiralty. It is of the highest public importance that the high standards of American jurisprudence in Admiralty Law be maintained.

III

It is of high public importance that the courts require strict conformance with laws and regulations designed to prevent collisions.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari may issue directed to the United States Court of Appeals for the Sixth Circuit commanding that Court to certify and to send to this Court a full and complete transcript of the record of all proceedings of said Court in the above entitled cause, to the end that said cause

may be reviewed and determined by this Court as provided by law.

And your petitioner will ever pray.

AMERICAN STEAMSHIP COMPANY,

By JOHN J. BOLAND, *President.*

LAURENCE E. COFFEY,
Counsel to Petitioner.

State of New York, }
County of Erie. } ss.:

JOHN J. BOLAND being duly sworn deposes and says that he is the President of American Steamship Company, the petitioner herein, that he had read the foregoing petition subscribed by him, and that the facts therein are true to the best of his knowledge, information and belief.

JOHN J. BOLAND.

Sworn to before me this
6th day of June, 1952.
Fenton F. Harrison,
Notary Public, State of New York.
Qualified in Erie County.
My Commission Expires March 30, 1953.
Reg. No. 4931.

I HEREBY CERTIFY that I have examined the foregoing petition. In my opinion the petition is well founded and the cause is one in which the prayer of the petitioner should be granted by this Honorable Court.

LAURENCE E. COFFEY,
Counsel to Petitioner.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

AMERICAN STEAMSHIP COMPANY, as owner of the Str. JOHN J. BOLAND,

Petitioner,

vs.

THE INTERLAKE STEAMSHIP COMPANY, as owner of the Str. FRANK ARMSTRONG,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This is the first collision case of which we have knowledge reaching litigation on the Great Lakes in which radar is a factor.

It is the first collision case reaching litigation anywhere of which we have any knowledge in which one of the colliding vessels was equipped with a compass course recorder accurately recording her changes in course and the times at which such changes were made.

It is the first collision case of which we have any knowledge in which there was a radar picture of the colliding vessels as they approached each other and reached collision in the scope of the radar of a third disinterested vessel (R. 424, Resp.'s Ex. R).

In the light of the long history of successful solutions of fog collision cases in the past, it is strange that in this

first case reaching an Appellate Court of which we have seen any report in which information afforded by these modern devices was available a high court, with a long and distinguished record in the decision of such cases, should have found itself so baffled.

Actually there are two elements in the case that do make the determination of controlling facts in the case comparatively simple.

The first of these elements is that the ARMSTRONG'S own compass course recorder furnished evidence of her courses and of alterations in her courses and the times of such alterations.

If her speed be known then there is no difficulty in arriving at how far toward Pelee Passage Light she had progressed at 12:02 A. M. and how far her altered course took her to the right and to the south at the time of collision.

Simple arithmetic furnishes her speed based upon the evidence from the disinterested SCHOONMAKER.

The SCHOONMAKER passed Pelee Passage Light at 11:15 P. M. (R. 432) and 17 miles farther west, Colchester Reef at 12:35 A. M. (R. 437). Her rate of speed is thus easily calculated and was at 12.7 miles per hour (R. 433).

The SCHOONMAKER'S time must have been in substantial synchronization with the ARMSTRONG because the collision was observed from the SCHOONMAKER shortly after 12:02 A. M. when the weather reports came over the radio-telephone (R. 441) and the collision by the ARMSTRONG'S compass course recorder was at 12:02 A. M. (R. 70).

The location of the ARMSTRONG when she passed the SCHOONMAKER is determined by the fact that the Master of the ARMSTRONG estimated it was two or three minutes

after altering course for the SCHOONMAKER that the two vessels were abreast (R. 117) and the alteration was at 11:45½ A. M. Consequently, it was about 11:48 when the two vessels were abreast or about 33 minutes after the SCHOONMAKER passed Pelee Passage Light. The SCHOONMAKER'S rate of speed being known, the approximate location of the SCHOONMAKER and that of the ARMSTRONG at about 11:48 A. M. when they passed each other is found.

With the approximate location of the ARMSTRONG at about 11:48 known her average rate of speed from the time she passed the East Channel Gas Buoys 12 miles west of Colchester Reef at 10:12 P. M. (R. 86) is easily calculated.

The location of the vessels at collision is a controlling fact with regard to responsibility for the collision.

There is available for determining the location of the vessels at collision a record of the courses taken by the ARMSTRONG and a ready means of arriving at her speed.

We doubt that in a lake fog collision case more precise evidence was ever available than in this one for determining the place of collision.

In another aspect the judgment in the case disregards a rule of common sense given recognition by two distinguished judges in the Sixth Circuit.

When the Steamer BOLAND passed Pelee Passage Light there was visibility for about two miles (R. 331). A four point bearing was taken on the light (R. 401). Such a bearing has precision because it is based on the mathematical certainty that the two sides of a right triangle are equal (R. 150). The BOLAND altered her course for Toledo when abreast the Pelee Passage Light (R. 332).

In both the cases of the Cambria S. S. Co. v. Pittsburgh S. S. Co., 189 F. 653, affirmed 212 F. 674 and Brown S. S.

Co. v. Fontana S. S. Co., 28 F. 2 939, with Judge Denison writing it was held that when a vessel does have a definite "fix" of her position at a time relevant to a collision it should require evidence of the most conclusive character to disturb that evidence.

In the ALBERTA, 23 F. 807, 810 Justice Henry Billings Brown then a District Judge wrote:

> "That the probability that a vessel, bound from one headland to another, will take the usual and direct course between them is so strong that a deviation from such a course, without adequate cause, ought to be established by the clearest preponderance of testimony."

Both the District Court and the Court of Appeals in this case ignored this common sense guide to decision.

The trial of this case began on February 7, 1950 and the oral testimony was concluded February 15, 1950.

The District Court permitted only 45 minutes oral argument to each side and took no briefs.

The views of the District Court appear to be largely controlled by some evidence from the Str. ELLWOOD which was east bound ahead of the ARMSTRONG. It was foggy when the ELLWOOD passed Colchester Reef (R. 142). She did not have radar and merely estimated she was 1.1 miles off Colchester Reef when she passed it. Even on her estimate she was .35 miles south of the 283° course shown on the chart and was bound to cross from left to right, from north to south, the course of vessels from Pelee Passage Light to Toledo before she reached Pelee Passage.

This was ignored by both the District Court and the Court of Appeals.

From the foregoing it may be observed on what a superficial examination of the case the judgment of the Court of Appeals is based.

The above discussion is not presented with any thought that the Supreme Court should examine the record in the case but in the belief that the matters discussed are clear and apparent without any intensive examination of the record.

We hope it may also be clear from the above discussion that the controlling facts of the case may be determined without weighing the credibility of witnesses against others. Such controlling facts being found the respective versions of the collision must fall in line with them.

In the jurisprudence of England and this country there is a long history of scrupulous care in the judgments rendered in collision cases.

The care given to the decision in fog collision cases is exemplified in this Court in such cases as

The Pennsylvania, 86 U. S. 125, 19 Wall. 125;
The Ludvig Holberg, 157 U. S. 60;
The Umbria, 166 U. S. 404;
The New York, 175 U. S. 187;
Lie v. San Francisco & Portland S. S. Co., 243 U. S. 291.

Among the notable decisions in the Sixth Circuit are:

The North Star, 62 F. 71;
Lake Erie Tr. Co. v. Gilchrist Tr. Co., 142 F. 89;
The George W. Roby, 111 F. 601;
Hawgood Tr. Co. v. Mesaba S. S. Co., 166 F. 697;
Great Lakes S. S. Co. v. Pittsburgh S. S. Co., 222 F. 862;
The Martin Mullen, 260 F. 916.

Out of a long experience we truthfully regard the judgment in this case as a judgment in an important maritime collision case a blemish upon American jurisprudence. We feel obligated to do our part to correct it. We believe the Supreme Court has an important responsibility in the exercise of admiralty jurisdiction.

It is, of course, of no public importance how the case is resolved with respect to money damages but it is a fact that during a time of tremendous demand for raw materials such as iron ore and coal the two vessels involved were out of commission for the remainder of the Great Lakes season of navigation and for over one month as a result of the reckless navigation of the Str. ARMSTRONG.

The enforcement of the laws and regulations designed to prevent collisions is of the highest public importance.

The borders of the states of Michigan and Ohio are, to a great extent, three of the Great Lakes. It is probably owing, in part at any rate, to that fact that a greater percentage of cases from the Great Lakes reach the Court of Appeals for the Sixth Circuit than to any other Appellate Court.

Therefore, the Court of Appeals for the Sixth Circuit is the court with a greater responsibility than any other for the enforcement of the laws and regulations for the Great Lakes.

Without the experience of this case we should not have believed that a court charged with such responsibility would have passed over so lightly the utter disregard of every law and regulation having application and the gross negligence shown in the evidence from the ARMSTRONG herself without resort to any other evidence.

Administrative agencies must look to the courts for guidance. The judgment in this case affords a basis for the Coast Guard to wink at violation of the laws and regulations designed to prevent collisions.

This era of a plethora of accidents is an ill time for a court charged with great responsibility to let down the standards.

It is respectfully submitted that the petition should be granted.

LAURENCE E. COFFEY
Proctor for Petitioner

LAURENCE E. COFFEY
LUCIAN Y. RAY
JAMES P. HEFFERNAN,
Of Counsel.

[redacted]

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 116

[redacted]

As owner of the Steamer Frank Armstrong,

Petitioner,

vs.

THE INTERLAKE STEAMSHIP COMPANY,

As owner of the Steamer Frank Armstrong,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

[redacted]

Counsel for Respondent,

[redacted]

Cleveland 13, Ohio.

[redacted]

Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1952.

No. 116.

AMERICAN STEAMSHIP COMPANY,
As owner of the Steamer JOHN J. BOLAND,
Petitioner,

vs.

THE INTERLAKE STEAMSHIP COMPANY,
As owner of the Steamer FRANK ARMSTRONG,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 603-609) is reported at 194 F. (2d) 25. Denial of petitioner's petition to the Court of Appeals for rehearing (R. 629) was without opinion. The opinion of the District Court (R. 567-572) is unofficially reported at 1950 A. M. C. 1678. The Findings of Fact and Conclusions of Law of the District Court (R. 573-575) are not reported.

JURISDICTION.

The petition for a writ of certiorari is invoked under 28 U. S. C. Sec. 1254(1).

QUESTION PRESENTED.

Simply stated the question presented is: Whether the District Court and the Court of Appeals erred in finding petitioner and respondent equally at fault for the collision occurring between their vessels.

STATUTES AND REGULATIONS INVOLVED.

The case is governed by the Pilot Rules for Navigation of Vessels on the Great Lakes, 33 U. S. C. Sections 241-294 and by the U. S. Inspector's Regulations for the Great Lakes, 33 C. F. R. Part 322.

Pilot Rule 15, 33 U. S. C. Sec. 272 provides as follows:

"Every vessel shall, in thick weather, by reason of fog, mist, falling snow, heavy rain storms, or other causes, go at moderate speed. A steam vessel hearing, apparently not more than four points from right ahead, the fog signal of another vessel shall at once reduce her speed to bare steerageway, and navigate with caution until the vessels shall have passed each other."

Pilot Rule 26, 33 U. S. C. Sec. 291 provides as follows:

"If the pilot of a steam vessel to which a passing signal is sounded deems it unsafe to accept and assent to said signal, he shall not sound a cross signal; but in that case, and in every case where the pilot of one steamer fails to understand the course or intention of an approaching steamer, whether from signals being given or answered erroneously, or from other causes, the pilot of such steamer so receiving the first passing signal, or the pilot so in doubt, shall sound several short and rapid blasts of the whistle; and if the vessels shall have approached within half a mile of each other both shall reduce their speed to bare steerageway, and, if necessary, stop and reverse."

Pilot Rule 28, 33 U. S. C. Sec. 293 provides:

"Nothing in these rules shall exonerate any vessel, or the owner or master or crew thereof, from the consequences of any neglect to carry lights or signals, or of any neglect to keep a proper lookout, or of a neglect of any precaution which may be required by the ordinary practice of seamen, or by the special circumstances of the case."

STATEMENT.

1. Nature of Case.

This admiralty cause concerns a maritime collision which occurred in a dense low lying fog on the early morning of November 2, 1948 (shortly after midnight of November 1), in the open waters at the westerly end of Lake Erie, north of the International Boundary Line between Pelee Passage Light (also known as Middle Ground Shoal) and Colchester Reef, a stretch of 17 miles, where petitioner's Steamer JOHN J. BOLAND, westbound, without cargo, on a voyage from Lorain to Toledo, Ohio, collided with respondents eastbound Steamer FRANK ARMSTRONG, laden with iron ore, on a voyage from Superior, Wisconsin to Erie, Pennsylvania.

The stretch of water between Pelee Passage Light and Colchester Reef is shown in the enlargement of U. S. Survey Chart identified as Libelant's Exhibit 6.

2. The Version of the Occurrence as Related by Witnesses on the BOLAND.

Petitioner has failed to set forth a statement of the evidence from the BOLAND. Such a statement is essential to a valid consideration of the question presented and, therefore, as briefly as possible, respondent presents the following summary of the BOLAND's testimony:

The BOLAND, eastbound, was sounding fog signals regularly and a few minutes after passing Pelee Passage Light, or Middle Ground, she checked to half speed on hearing the whistle of an approaching steamer (R. 333, 401), later identified as the Steamer ISAAC L. ELLWOOD (R. 346).

The BOLAND exchanged a one blast passing signal with the ELLWOOD and passed her port to port about two ship lengths off (R. 334) or about 1000′ (R. 366,367).

At about 11:36 P. M. the BOLAND heard the ELLWOOD call the ARMSTRONG, which was astern of her, and report that the ELLWOOD had met four upbound vessels and the ARMSTRONG replied that she had them in her scope (R. 334), which indicated to the BOLAND that the ARMSTRONG was downbound from the Detroit River to Middle Ground (R. 334, 402).

The BOLAND heard continuous fog signals from the approaching vessel (the ARMSTRONG) sounding at first 1½ points on the starboard bow (R. 336, 362, 372, 403) and the angle widened (R. 336, 341). However, a bearing cannot be determined absolutely in fog (R. 372) because fog is deceiving (R. 454). The BOLAND states that she did not hear any one blast passing signals from the ARMSTRONG (R. 342, 488). The BOLAND continued blowing her fog signal (R. 337) and then saw the beam of a searchlight bearing about 2 points or better (R. 363, 461) on her starboard bow. The 2nd Mate then turned on the BOLAND'S searchlight which had not been burning theretofore (R. 456, 469).

The BOLAND blew a two blast signal (R. 336), which she claims was answered by the ARMSTRONG (R. 336-337, 362, 465).

Fog signals from the ARMSTRONG were heard continuously (R. 362). The BOLAND blew more fog signals (R. 363), but did not check to bare steerageway (R. 363), which on the BOLAND was approximately three miles per hour (R. 374). Further, the BOLAND did not know the course or speed of the ARMSTRONG (R. 370).

The watchman on the BOLAND saw the lights of a ship ahead bearing 4 points on the starboard bow and reported it (R. 461). From the time the BOLAND had passed the ELLWOOD until the searchlight was observed, the BOLAND blew no whistle signals other than fog signals (R. 461-462, 470).

The Captain of the BOLAND knew that Pilot Rule 15 (33 U. S. C. Sec. 272) requires a vessel hearing another vessel approaching within 4 points of her bow to check to bare steerageway; he did not do so (R. 370).

Two or three minutes after the first exchange of two blasts the BOLAND blew a second two blast passing signal (R. 362, 363) which was answered (R. 362, 462). At that time the BOLAND was not sure of the course of the ARMSTRONG or her distance off (R. 375), but the Captain said: "Thank God, we are by him" (R. 487). The searchlight was then 3 to 4 points on the starboard bow (R. 487).

About two minutes later the BOLAND blew a third set of two blasts (R. 337, 364), which was not answered (R. 337, 462).

At this time, shortly after midnight, the lookout on the forecastle was changed (R. 377, 462, 465, 493), and a short time previously the 3rd mate had been relieved by the 2nd mate (R. 369, 455).

Then, seeing the beam of the searchlight and red light of the vessel close ahead on the starboard bow (R. 337, 338, 373) bearing 45° (R. 365) or more (R. 487), the wheel of the BOLAND was ordered hard left and the engine was put full speed astern (R. 337, 457, 487). It was then too late to try to go to the right to pass under the stern of the ARMSTRONG (R. 373), there was not time for the rudder to take effect and the collision happened seconds thereafter (R. 338, 457, 488).

The BOLAND never sounded a danger signal (R. 365, 457, 484) and she was not stopped before she reached the ARMSTRONG (R. 371).

The steering and communication systems of the BOLAND were disabled (R. 338), however, there was no quick settling of her forward end after the collision. It was not enough to be noticeable within one half hour (R. 415).

Later the Steamer J. P. WELLS (R. 339, 378) and then the LESLIE came alongside (R. 340) and the latter vessel took the BOLAND to Toledo (R. 223, 340).

3. Counter-Statement of Facts as Related by the ARMSTRONG.

In a number of important respects respondent finds it impossible to accept petitioner's statement as to the evidence of the ARMSTRONG and rather than to undertake a piece-meal acceptance and rejection thereof, respondent deems it advisable to make the following counter-statement:

While petitioner does state that the ARMSTRONG was equipped with radar, it makes no mention of the fact that the ARMSTRONG'S radar was not operating dependably despite the fact that mechanics had been aboard several times prior to November 1, 1948 to correct the difficulty (R. 84). The District Court so found (R. 573, Finding 6), as did the Court of Appeals (R. 607). Objects approaching within ½ mile radius could not be seen on the radar due to a white spot in the center of the scope and the entire picture on the scope would fade out (R. 84, 118).

The ARMSTRONG was equipped with a searchlight on top of her pilothouse (R. 97-98) and this light had been turned on with its rays directed upward before the vessel reached Colchester (R. 98). Neither the direction nor pitch of the light was changed thereafter (R. 100).

At 11:20 P. M. the ARMSTRONG was abreast Colchester Reef (R. 89, 108) on course 101° (R. 87, 205, 206).

About 11:35 P. M. (R. 116), the Steamer ELLWOOD, which was also downbound and some distance ahead of the ARMSTRONG (R. 90, 116) called the ARMSTRONG by radiotelephone and reported she had just met four upbound vessels, one right after the other, on the one whistle

side (port to port) and the ARMSTRONG would be seeing them shortly (R. 91, 146).

The ARMSTRONG was sounding fog signals regularly (R. 91, 94, 119, 209, 269) and could hear fog signals from vessels ahead (R. 91, 94) on the port side (R. 92, 279). The approaching vessels could be seen on the radar scope, one right after the other, in a line running parallel and to port of the ARMSTRONG (R. 94, 117).

When about one mile from the first of the four vessels, later identified as the SCHOONMAKER, the ARMSTRONG exchanged one blast passing signals with this vessel and hauled 5° to the right (R. 95). The two vessels passed port to port (R. 207) with the SCHOONMAKER about ½ mile to the northward (R. 95, 130), although she was not visible in the ARMSTRONG's radar because of the blot in the center of the scope (R. 100).

At that time the next three approaching vessels were seen on the radar and appeared to be in line (R. 96, 130, 209) with the leading vessel, the BOLAND, about one mile away (R. 130) and one point (11¼°) or two points on the port bow (R. 132). The ARMSTRONG was hauled 5° to the right to give the approaching vessels more clearance (R. 95, 130).

The ARMSTRONG blew a one blast passing signal to the BOLAND which was not answered (R. 96, 210, 280). This passing signal was repeated several times between the regular fog signals but was never answered by the BOLAND (R. 96, 119, 136, 210, 241, 280, 289). Fog signals from the BOLAND were heard distinctly by the lookout on the ARMSTRONG (R. 285), first about ½ point on the port bow and then widening to 3½ to 4 points (45°) on the port bow (R. 284).

Thereupon, at 11:15 P. M. the ARMSTRONG was checked to half speed ahead (R. 96, 109, 124, 136, 207, 211)

and the heading was changed to 115° (R. 67), then the wheel was put hard over to the right and the heading swung to about 127° (R. 97, 121, 134, 210). During the swing to the right the ARMSTRONG continued to blow one blast passing signals between fog signals but the BOLAND did not reply (R. 97, 119, 211, 242, 297). Only fog signals were heard from the BOLAND (R. 97, 212).

While the ARMSTRONG was proceeding under checked speed and her bow was swinging to the right, the beam of the light from another vessel was seen bearing about 21° or more on the port bow (R. 98, 212, 271, 281). That vessel could not be seen (R. 98) but she blew a two blast passing signal (R. 97, 271, 281) not more than one minute before the collision (R. 97, 281) which the ARMSTRONG answered with a danger signal (R. 98, 213, 281, 320). In fact, at no time did the ARMSTRONG blow a two blast passing signal (R. 99, 273, 281).

Then the bow of the BOLAND hove into view about 200′ away and bearing about 3 points on the port bow of the ARMSTRONG (R. 99, 212, 281). The ARMSTRONG was backed full speed astern (R. 99, 212, 213) and the wheel was put hard right (R. 212, 273).

The BOLAND was coming fast (R. 99, 213) and her stem struck the port bow of the ARMSTRONG about 15′ abaft her stem, at an angle of about 45° (R. 99, 102, 213) penetrating the ARMSTRONG for approximately 12′ to 15′ (R. 100, 214).

The collision occurred at approximately 12:03 A. M. November 2 (R. 70). The ARMSTRONG continued to back as she swung to the right and the vessels separated in the fog (R. 100). Thereafter, the ARMSTRONG tried unsuccessfully for ½ to ¾ of an hour to communicate with the BOLAND by radiotelephone (R. 101, 135, 216).

As a result of the serious damage suffered by the ARMSTRONG, her forepeak was full of water and her bulk-

head was buckled (R. 235, 236) and leaking (R. 102, 234, 292) and she was going down by the head (R. 102). Thereafter the ARMSTRONG, having turned around, proceeded back to the shallow water at Bar Point (R. 101).

4. Disinterested Testimony.

There was testimony from witnesses on vessels in the general vicinity of the collision; the ISAAC L. ELLWOOD, the ALEXANDER LESLIE, the CHARLES A. PAUL, the MYRON C. TAYLOR and the JAMES M. SCHOONMAKER. The extent to which such disinterested testimony was of assistance is set forth in the opinions of the Courts below. Since both Courts expressly relied on the testimony of the master of the Steamer ISAAC L. ELLWOOD, we summarize his testimony herewith:

The Steamer ISAAC L. ELLWOOD was proceeding down the Lake ahead of the ARMSTRONG and after passing Colchester at 10:07 P. M. she steered a course of 103° for Middle Ground Light (R. 141). At 11:07 P. M. she checked to half speed ahead (R. 145) because she was meeting four vessels substantially in line about one mile apart (R. 143, 144) on her port side (R. 143). These vessels were very close to the northerly sailing line on libellant's Exhibit 6 (R. 143).

All four of the upbound vessels passed the ELLWOOD port to port at 700′ to 900′ off (R. 144) after exchanging one blast passing signals. The first vessel, the SCHOONMAKER, was passed (R. 143) and the second vessel in line, the BOLAND, was passed 3½ miles to 4 miles west of Pelee Passage Light (R. 144). The last vessel was passed at 11:40 P. M. (R. 144) and the ELLWOOD, then being 1½ miles from Middle Ground (R. 146), called the ARMSTRONG, which was astern, and advised her that she would be meeting four vessels in line (R. 146). The four vessels

appeared to be proceeding at practically the same speed (R. 152).

About 12:10 A. M. November 2, the ELLWOOD learned of the collision between the ARMSTRONG and the BOLAND and heard the ARMSTRONG make several calls to the BOLAND which were unsuccessful (R. 147).

5. Conclusion of the Trial Court.

The District Court found that the ARMSTRONG's radar was out of order or not working dependably (R. 574, Finding 6).

The District Court found the ARMSTRONG was negligent in its failure to check its speed, to blow danger signals, or to take necessary precautions when its one blast passing signals were unanswered (R. 574, Finding 7).

The District Court further found the BOLAND was negligent in going at too great a speed under the foggy conditions and in failing to take necessary precautions because of her converging course (R. 574, Finding 8).

The District Court found that each vessel failed to adopt the required precautionary measures by way of signals and checking before emergency action was necessary (R. 574, Finding 9).

The Court concluded as a matter of law that the case was governed by United States law, that therefore the equal division rule of damages was applicable, and that the vessels were equally at fault for the collision and should share the damages equally (R. 574-5).

In its memorandum opinion the District Court stated that its finding and conclusions would be the same even if Canadian law applied (R. 572). The Court further stated that little of the evidence from the respective vessels as to location and signals could be reconciled with the physical facts (R. 568, 569), that the testimony of the

BOLAND as to her location was impaired by the disinterested testimony from the Steamer ELLWOOD (R. 569) and that the testimony of the ARMSTRONG as to courses, signals, navigation and locations more nearly approached the truth (R. 572).

6. Conclusion of the Court of Appeals.

The unanimous affirming opinion of the Court of Appeals (R. 603-609), rendered after "a most painstaking study of the record" includes the following findings and conclusions:

a. The BOLAND, hearing fog signals off its starboard bow was at fault in failing to reduce her speed to steerageway (R. 607);

b. The BOLAND failed to alter course or reduce speed even though her master actually knew the vessel was in a dangerous situation (R. 607);

c. The BOLAND failed to take the precaution of seasonably lighting her searchlight and pointing it skyward as the ARMSTRONG had done (R. 607);

d. The ARMSTRONG was at fault in not reducing speed to bare steerageway and to navigate with caution after receiving no response to its one blast passing signal (R. 606-7);

e. The ARMSTRONG's radar was not functioning dependably (R. 607);

f. Both vessels were at fault to an equal degree and, therefore, it was unnecessary to decide whether recovery should be governed by Canadian or American law (R. 608);

g. No error could be perceived in the findings and conclusions of the Trial Court (R. 609).

ARGUMENT.

1. Since petitioner ignores the faults found against the BOLAND, no basis is presented for review of the finding that the vessels were equally at fault.

Comparison by the District Court and the Court of Appeals of the faults found against the BOLAND and ARMSTRONG respectively was purely a finding of fact. In the absence of a very obvious and exceptional showing of error there is no basis for review in this Court of concurrent findings of fact by two courts below. *Graver Mfg. Co. v. Linde Company,* 336 U. S. 271. This rule is applicable in admiralty cases. *The Carib Prince,* 170 U. S. 655; *The Wildcroft,* 201 U. S. 378. Especially is the rule applicable in fog collisions "where it is so seldom possible to come to any certain conclusions as to the speed and positions of the vessels." *United New York Sandy Hook Pilots Ass'n. v. Den Norske, etc.,* 121 F. (2d) 304, 305 (C. A. 2—1941), certiorari denied 314 U. S. 684.

Petitioner requests a review of the judgment below on the ground that the evidence of the ARMSTRONG alone shows her to have been guilty of gross and glaring negligence (Petition pp. 2-3). Nowhere in its brief does petitioner dispute the findings of fault against the BOLAND or attempt to minimize their fundamental seriousness. Therefore, even if this Court should find that the negligence of the ARMSTRONG was gross, such a characterization would be meaningless unless comparison was made with the character of the faults found against the BOLAND. Petitioner in ignoring the faults of the BOLAND denies this Court any basis for making such a comparison and, therefore, under the "two court rule" petitioner presents no basis for review.

2. The faults of the BOLAND were fundamental and serious.

The District Court found that the BOLAND was negligent in going at too great speed under the foggy conditions and in failing to take necessary precautions because of her converging course (R. 574, Finding 8), and that she failed to take necessary precautions by way of signals or checking prior to the time for emergency action (R. 574, Finding 9). The Court of Appeals adopted and particularized these findings, holding that the BOLAND was at fault for failing to reduce her speed to bare steerageway upon hearing fog signals ahead (R. 607), especially when her master knew that danger existed (R. 607), and that she was at fault for neglecting the prompt use of her searchlight (R. 607).

The Court of Appeals said (R. 607):

> "One bit of evidence, it seems to us, speaks eloquently of the BOLAND's fault * * * (The wheelsman testified): 'well, yes, Capt. Monroe (master of the BOLAND) blew and after the second set was blown Capt. Monroe said, *'thank God, we're by him.'* This observation points to the apprehension of Capt. Monroe that he was in a dangerous situation. How long before he had sensed the danger is impossible to say except that it must have been several minutes before the crash, in view of his evidence that he blew three passing signals, interspersed with repeated fog signals, minutes apart. Thus, conscious of danger, Capt. Monroe failed to alter his course or check his speed until he observed the range lights of the ARMSTRONG and collision could not be avoided."

The BOLAND's failure to make her location known by prompt use of her searchlight was a violation of the general precautionary rule, Rule 28, *supra*.

The BOLAND's immoderate speed in fog was a violation of Great Lakes Pilot Rule 15, *supra. The Colorado,* 91 U. S. 692 (1875) (5 to 6 miles per hour excessive); *The George W. Roby,* 111 F. 601 (C. A. 6—1901), certiorari denied 183 U. S. 699 (4 to 6 miles per hour excessive); *The Alberta,* 23 F. 807 (D. C. E. D. Mich.—1885) (6 miles per hour excessive).

The BOLAND's failure "at once" to reduce her speed to bare steerageway upon hearing the fog signals of the ARMSTRONG "not more than four points from right ahead," and her further failure to sound a danger signal and stop and reverse when her master actually knew of the danger ahead, were violations of Rule 15 and Rule 26, *supra. The North Star,* 62 F. 71 (C. A. 6—1894); *The George W. Roby, supra.*

These *statutory* violations of the BOLAND prevent any application of the "major and minor fault rule" in her favor, for as a result of such statutory violations it must be presumed, as two courts found to be the fact, that her faults, if not the sole cause, were of major importance in contributing to the collision. The rule of presumption and burden of proof arising from statutory fault is stated in *The Pennsylvania,* 19 Wall. 125, 136 (1873) as follows:

> "But when * * * a ship at the time of a collision is in actual violation of a statutory rule intended to prevent collisions, it is no more than a reasonable presumption that the fault, if not the sole cause, was at least a contributing cause of the disaster. In such a case the burden rests upon the ship of showing not merely that her fault *might not* have been one of the causes, or that it probably was not, but that it *could not* have been. Such a rule is necessary to enforce obedience to the mandate of the statute." (Emphasis supplied.)

If all other faults of the BOLAND were arbitrarily excluded, her failure to reduce to bare steerageway upon

hearing the fog signals of the ARMSTRONG ahead, would be sufficient to render her equally at fault with the ARMSTRONG. In *Lie v. San Francisco and Portland Steamship Co.*, 243 U. S. 291 (1917), the BEAVER was found "palpably" at fault for her excessive speed in fog and the SELJA was found at fault for her failure to stop upon hearing the fog signals of the BEAVER ahead. The SELJA was going at half speed of 6 knots when she heard the fog signals of the BEAVER 16 minutes before collision. 11 minutes before collision she reduced speed to 3 knots. 6 minutes before collision she stopped her engines, and 2 minutes before collision she was nearly at a stand-still. It was argued that the negligence of the SELJA, if any, was a remote and not a proximate cause of the collision. The Court in rejecting this contention said at p. 296:

"Of these rules the following is applicable to the case we are considering:

> 'Art. 16. Every vessel shall, in a fog, mist, falling snow, or heavy rain-storms, go at a moderate speed, having careful regard to the existing circumstances and conditions.
>
> 'A steam vessel hearing, apparently forward of her beam, the fog-signal of a vessel the position of which is not ascertained shall, so far as the circumstances of the case admit, stop her engines, and then navigate with caution until danger of collision is over."

"The most cursory reader of this rule must see that while the first paragraph of it gives to the navigator discretion as to what shall be 'moderate speed' in a fog, the command of the second paragraph is imperative that he shall stop his engines when the conditions described confront him. The difficulty of locating the direction or source from which sounds proceed in a fog, renders it not necessary to dwell upon

the purpose and obvious wisdom of this second paragraph of the rule."

And at p. 298:

"* * * the effect of the wilful disobedience of this imperative and important statutory rule of law, which should have governed his conduct, continued as an effective force, operating on the movement of his vessel to the instant of collision, driving her forward steadily, even though in the last moments slowly, to the fateful point of intersection of the courses of the two ships.

"Such a state of fact makes sharply applicable the conclusion of this court in The Pennsylvania, 19 Wall. 125; * * *"

The Court further held that the major-minor fault rule could not be applied in favor of the SELJA, saying at p. 299:

"The case is not one for the application of refinements as to what would have been good seamanship without the rule, such as we are invited in argument to consider, nor is it a case for consideration of the doctrine of major and minor fault. Both of the masters were palpably negligent in respects which contributed directly to cause the collision; the negligence of each continued to operate as an efficient cause until the moment when the accident occurred, and we agree with the lower courts that the case is one in which the master and owner of the 'Selja' must be left to suffer their self-inflicted loss."

In the *Lie* case, *supra*, the SELJA stopped her engines 6 minutes before collision and was condemned equally with the BEAVER. Petitioner's vessel, the BOLAND, long after the fog signals of the ARMSTRONG were first heard, continued on at the same speed until her master actually saw the ARMSTRONG close ahead and she was about to plow into the ARMSTRONG's bow (R. 337, 370). The Courts

below were correct in condemning the BOLAND for her statutory faults.

3. Uniformity of decision is not disturbed by the Findings below.

a. Radar.

The cases cited in petitioner's brief (p. 17) are readily distinguishable since presumably the radars involved in those cases were operating efficiently and could be relied upon. Although mechanics had recently been aboard to correct the difficulty, a white spot persisted in the center of the ARMSTRONG's radar scope which blotted out all objects within one-half mile of her position. The ARMSTRONG's radar was not functioning dependably and both courts so found (R. 573, Finding 6; R. 607).

b. Stand-by Rule.

There is no substance to petitioner's contention at p. 18 of the petition that the Stand-by Rule is applicable to this case. The evidence shows that after the BOLAND had rammed the ARMSTRONG the vessels separated and lost each other in the dense fog. The ARMSTRONG's stem had been penetrated 12′ to 15′ (R. 100, 214), her windlass room was jammed in, her collision bulkhead was leaking (R. 235-236), her forepeak was full of water (R. 102), she was going down by the head (R. 101-102) and her crew were at their abandon ship stations (R. 136). In these circumstances the ARMSTRONG remained at the scene for a considerable period attempting to communicate with the BOLAND by radiotelephone (R. 101, 135). Not until the ARMSTRONG heard that the Steamer J. P. WELLS was going to the assistance of the BOLAND did the ARMSTRONG leave the scene to seek safe anchorage (R. 135). Certainly the

ARMSTRONG did all that reasonably could be expected of her and she was justified in then seeking a safe anchorage.

c. Alteration of Helm.

Nor is there any substance to petitioner's statement at p. 3 of the petition that the Court of Appeals condoned the ARMSTRONG's changes in course contrary to the authority of controlling decisions. The master of the ARMSTRONG, from his radio conversation with the ELLWOOD, had reasonable grounds for believing that the SCHOONMAKER, BOLAND and the two following vessels were all in line on his port hand. Indeed, both courts found that the BOLAND took her departure on the course to Toledo well beyond the usual turning place at Middle Ground (R. 569, 605-6) so that for a considerable time during the approach of the two vessels the BOLAND was on the Colchester course; that is, the reverse of and parallel to the course of the ARMSTRONG. Therefore, the master of the ARMSTRONG was exercising reasonable precaution when he ordered the vessel to the right before and after passing the SCHOONMAKER. *The Umbria*, 166 U. S. 404; *The Munrio*, 11 F. (2d) 900 (D. C. N. D. Cal.—1926); *Dollar S. S. Line v. Matson Nav. Co.*, 23 F. (2d) 554 (C. A. 9—1928).

But the Court of Appeals did not condone the ARMSTRONG's navigation after she received no reply to her one blast whistles to the BOLAND.

The Court said (R. 606-607):

> "When the ARMSTRONG received no response to its one blast passing signals, if they were blown, it was at fault in not reducing its speed to bare steerageway and to navigate with caution."

This finding of fault cast in terms of what the ARMSTRONG *should have done* under the Pilot Rules, was obviously a condemnation of what she *did do*. The decisions

cited by petitioner at pp. 14 to 16 of its brief differ only in emphasis, not in principle, from the lower court decision in the instant case. This is obvious from petitioner's quotation at p. 15 of its brief from *The Alberta*, 23 F. 807, where the duty is both affirmatively and negatively stated. The Court said:

> "It is one of the elementary rules of navigation that a vessel ought never to alter her helm in ignorance of the position and course of an approaching vessel. * * * Instead of experimenting, it is her duty to stop, and sometimes to reverse."

Furthermore, in *The North Star*, 62 F. 71 (C. A. 6—1894), cited at p. 14 of petitioner's brief, the characterization of the faults of the SHEFFIELD as "reckless" and "gross" as compared to the faults of the NORTH STAR, was made at a time when the faults of the latter vessel were measured by a less exacting standard than now exists. The NORTH STAR was found at fault for violation of Rule 21, Sec. 4233 R. S., which provided as follows:

> "Every steam vessel, when approaching another vessel so as to involve risk of collision, shall slacken her speed, or if necessary, stop and reverse; and every steam vessel shall, when in a fog, go at a moderate speed."

In regard to the duty of the master to slacken speed, the Court at p. 77 construed Rule 21 according to its terms but added the following proviso:

> "* * * unless such circumstances present themselves to him at the time as would lead a reasonably prudent and skillful navigator to the confident belief that no risk of collision exists."

In 1895 Rule 21 was superseded by Rules 15 and 26, *supra*. The duty to stop and reverse was no longer subject to qualification by the reasonable judgment of the navi-

gator but was made absolute. Regardless of the distance separating the two vessels, the master of one vessel hearing the fog whistle of another ahead is imperatively required "at once" to stop and reverse. *The George W. Roby*, 111 F. 601 (C. A. 6—1901), certiorari denied 183 U. S. 699, *supra*. See *Lie v. San Francisco and Portland Steamship Co.*, 243 U. S. 291 (1917) *supra*.

In addition to the BOLAND's failure to reduce speed upon hearing the fog signals of the ARMSTRONG ahead, the Court's below also convicted the BOLAND of further statutory faults which were of a fundamentally grievous nature; immoderate speed in fog; failure to sound a danger signal, stop and reverse when her master actually knew that danger of collision existed; and failure to use her searchlight to aid the approaching ARMSTRONG.

It is immediately apparent that the faults of the BOLAND were not only more numerous but more flagrant than were the faults found against the NORTH STAR in the case of *The North Star, supra*.

Other faults might well have been found against the BOLAND. For example, the District Court suggested that the BOLAND's dilatory shaping of course to Toledo (R. 569-570) made her insistence upon a starboard to starboard passing "gross negligence" (R. 570). See *The Loomis*, 86 F. (2d) 705, 707 (C. A. 2—1936). If the BOLAND had promptly taken the Toledo course at Middle Ground or had advised the ARMSTRONG by radiotelephone that her taking of the Toledo course was delayed, there would have been no collision.

CONCLUSION.

Petitioner, by ignoring the faults of the BOLAND, thwarts any comparison by this Court of the faults which were found or which might have been found against the vessels by the Courts below. Furthermore, petitioner fails to present for ultimate decision any novel question of law or conflict of decision. Certainly there is no question of national importance or public interest involved.

It follows, therefore, that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1952

No. 116

AMERICAN STEAMSHIP COMPANY, as owner of the Str. JOHN J. BOLAND,

Petitioner,

vs.

THE INTERLAKE STEAMSHIP COMPANY, as owner of the Str. FRANK ARMSTRONG,

Respondent.

PETITIONER'S BRIEF IN REPLY

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BATAVIA TIMES, LAW PRINTERS,
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about the moment of collision in a fog about as thick as may be imagined (Petition pps. 6, 7). Respondent adverts to the testimony of the master of the ARMSTRONG that she was checked at 11:55 P. M., about 7 minutes before the collision (Respondent's Brief, p. 7) erroneously in its brief giving the time of that claimed check as 11:15 P. M. instead of 11:55 (R. 109, 236).

Respondent also refers to the claim that the ARMSTRONG was abreast Colchester Reef at 11:20 P. M. (Respondent's Brief, p. 6).

It ignores that the log entries as to passing Colchester Reef and as to a check at 11:55 P. M., were not made until an hour after the collision, that slips of a scratch pad on which it was claimed they were made were not preserved and that there was no evidence of any search for them, although there was a Coast Guard hearing aboard the Steamer ARMSTRONG two days following the collision (R. 108).

It was 17 miles between Colchester Reef and Pelee Passage Light (Record 87).

The SCHOONMAKER passed Pelee Passage Light, known also as Middle Ground, at 11:15 P. M. (R. 432), and was abreast the ARMSTRONG about 11:48 P. M. (Petitioner's Brief p. 23). At the SCHOONMAKER's rate of speed of 12.7 miles per hour (R. 433), in the 33 minutes which elapsed between the time the SCHOONMAKER passed Pelee Passage Light until she was abreast the ARMSTRONG, she went about 7 miles (6.98 miles), so that when the ARMSTRONG and SCHOONMAKER were abreast, they were about 10 miles east of Colchester Reef Light.

If the ARMSTRONG passed Colchester Reef Light at 11:20 she made that 10 miles in about 28 minutes or in less than

half an hour, so that she would have had to have gone at a rate of 20 miles or more per hour against her claimed rate of speed of 11 miles per hour (R. p. 86), and far, far in excess of her capacity.

II

Respondent lamely attempts to excuse the ARMSTRONG's alteration in course.

It is only common sense that to blindly make a change of course in a dense fog is the worst kind of navigation, and has been long so regarded in the most authoritative opinions.

III

Respondent impales the ARMSTRONG on both horns of the dilemma in connection with her radar. First, futile effort is made to excuse failure to use the radar in the critical moments before the collision because of claimed defects, although it was good enough to determine that the SCHOONMAKER was about ½ mile to the north of the ARMSTRONG when abreast (R. pps. 95, 118). Second, reliance is placed upon radar in the attempted excuse for the alteration in the course of the ARMSTRONG to the right. Nothing could be more obvious than that if such a radar observation had been correct, the collision could not have occurred because if the BOLAND had been approaching on the left of the ARMSTRONG, as was the reported observation, with the ARMSTRONG going to the right, no collision could have occurred. Therefore, the observation was patently grossly in error.

IV

As to the BOLAND

Respondent has ignored the basis on which the petition rests. Our feeling was that it would be an imposition upon this Court to ask it to review the whole case, and the petition is explicitly rested on the ground that on the evidence from the ARMSTRONG alone, she was guilty of the most grave and flagrant violation of the rules of navigation and of gross negligence.

Respondent emphasizes the testimony from the Steamer ISAAC L. ELWOOD which made both the District Court and the Court of Appeals go awry (Respondent's Brief, p. 9).

The BOLAND passed Pelee Passage Light at 11:22 P. M. (R. 332). There was then visibility for about 2 miles (R. 331).

By a 4 point bearing, the BOLAND was about .7 miles off Pelee Passage Light when abreast (R. 401).

Abreast Pelee Passage Light, the BOLAND'S course was altered to the left for the Toledo course (R. 332, 333, 401).

We have never known before of positive testimony of such a character to be disregarded on the basis of mere suspicion.

There is absolutely no basis for disregarding the evidence that the BOLAND did so alter her course for Toledo at Pelee Passage Light, excepting upon the basis of mere estimates made from the Steamer ELWOOD in fog.

The ELWOOD was eastbound and fog had set in before the ELWOOD passed Colchester Reef Light (R. 142). She was not equipped with radar (R. 142). It was merely an

estimate then that the ELWOOD was 1.1 miles off Colchester Reef when abreast (R. 141).

The master of the ELWOOD admitted that even if a light is *visible* but a 4 point bearing, (or bow and beam bearing) cannot be had, the distance must be estimated from looking over water (R. 145, 150).

The line of the course on the chart of 103 degrees from Colchester Reef to Pelee Passage Light is from a point .75 miles off Colchester Reef Light. Steering on 103 degrees from *1.1* miles off Colchester instead of from .75 miles off Colchester, was bound to take the ELWOOD from left to right across the chart course of 278 degrees from Pelee Passage Light, the Toledo course, for a westbound vessel.

As the 1.1 miles distance off was a mere estimate the ELWOOD may well have been farther to the south.

In any event, the conclusion of the lower courts was based on merest estimates from the ELWOOD which were taken as sufficient to controvert direct and positive evidence and imputed to the BOLAND navigation which was highly improbable, in that she went past a visible aid to navigation with fog coming on, without making the alteration in course for the port to which she was bound.

This conclusion was therefore based on mere suspicion and in disregard of guides to decision recognized by two of the finest admiralty judges who ever sat in the Sixth Circuit (Petitioner's Brief, pps. 23, 24).

V

The place of the Supreme Court in the administration of the admiralty in this country is of first importance.

Recognition was given to the importance of the Supreme Court in the admiralty in the dissenting opinion of Mr. Jus-

tice McKenna in *The Western Maid*, 257 U. S. 419, 435 at follows:

> "The court has kept steadily in mind that the admiralty jurisprudence of the country, as adopted by the Constitution, has a distinctive individuality, and this court has felt the necessity of keeping its principles in definite integrity, and the remedies intact by which its principles can alone be realized."

VI

The petition should be granted

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